82-742

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

FOUNDATION FOR THE HANDICAPPED
Petitioner,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES
OF THE STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

SWEET, DUSSAULT, NEFF &
GIBBS, P.S.
By: WILLIAM L. E. DUSSAULT
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QUESTIONS PRESENTED

1. Did the Supreme Court of Washington commit error by upholding the notice and appeal provisions of RCW 72.33.670 (1981) as applied to mentally and physically handicapped residents of state institutions who, while not subject to a judicial declaration of incompetency, by statutory requirement and known disability, are incapable of understanding or responding to notice in a manner which satisfies the "notice and opportunity to be heard" requirements of the due process clause of the fourteenth amendment to the United States Constitution?

2. Whether the Supreme Court of Washington committed error in upholding the disparate treatment of identically situated residents of state schools under RCW 72.33.670 (1981) by collecting funds from some residents subject to a guardian of the

estate, but not from other similarly situated residents, based solely on a legislative drafting error and not upon a rational relationship to a legitimate governmental objective, as required by the equal protection clause of the fourteenth amendment to the United States Constitution?

3. By its ruling in Duffy v. Social & Health Services, 90 Wn.2d 673, 583 P.2d 470 (1976), that RCW 72.33.670 (1981) was unconstitutional as applied to one segment of equally situated individuals and the ruling in the present case that the statute could be applied to another segment of equally situated individuals without constitutional violation, did the Washington Supreme Court violate the equal protection clause of the fourteenth amendment by allowing discretionary differential application of the statute without any rational basis for doing so?

4. If RCW 72.33.670 (1981) is ruled partially inapplicable or unconstitutional under either the due process clause or equal protection clause of the fourteenth amendment, does the statute thus violate RCW 49.60 (1981) by permitting collection of funds based solely upon perceived mental capacity?

LIST OF PARTIES

FOUNDATION FOR THE HANDICAPPED,[1]
Petitioner,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES
OF WASHINGTON STATE,
Respondent.

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[1]The Foundation represents the following individual petitioners: GERALD DUNN; STEPHEN MADDOX, by and through his guardian ad litem, THE FOUNDATION FOR THE HANDICAPPED; PEGGY JEAN WIGINTON, by and through her guardian ad litem, THE FOUNDATION FOR THE HANDICAPPED; DONALD WOODWARD, by and through his guardian ad litem, THE FOUNDATION FOR THE HANDICAPPED; THEODORE BROWN, by and through his guardian ad litem, THE FOUNDATION FOR THE HANDICAPPED; LEONA WAKEFIELD, by and through her guardian ad litem, THE FOUNDATION FOR THE HANDICAPPED; GARY JENKINS, by and through his guardian, LINDA DUFFY; and JACK FURLAN, by and through his guardian, ELSIE GRANATA.

In an order on June 12, 1980, the trial court determined that the persons represented by the Foundation for the Handicapped, for which it served as guardian or

limited guardian of the person and/or estate, or representative payee for the purpose of receipt of state or federal benefits and the other named plaintiffs "will fairly and adequately represent the legal rights and best interests of all the present and potential residents of the state residential schools and institutions concerned in this litigation." (R-125.) The trial court certified this case as a class action "insofar as those individuals are concerned . . ." (R-125).

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Petitioner,

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DEPARTMENT OF SOCIAL AND HEALTH SERVICES
OF THE STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

The petitioner, Foundation for the Handicapped, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Washington entered in this proceeding on July 29, 1982.

OPINIONS BELOW

The opinion of the Supreme Court of Washington is reported in 97 Wn.2d 691, 648 P.2d 884 (1982), and appears in Appendix A.

The opinion of the Superior Court is unreported and appears in Appendix B.

JURISDICTION

The judgment of the Supreme Court of Washington affirming respondent's summary judgment was filed on July 29, 1982. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

RCW 72.33.670 (1981). The statute appears in Appendix C.

STATEMENT OF THE CASE

I. Facts

The individual named petitioners are all class members who either currently reside in one of the five state residential institutions for the retarded ("schools") in the state of Washington or have resided in one of such "schools" for some period of time since July 1, 1967.

To be admitted and remain as a resident, an individual must meet either the mental or physical handicap definitions contained in RCW 72.33.020 (1981):

> Mental handicap is a state of limited development in consequence of which the individual affected is mentally incapable of assuming those responsibilities expected of a socially adequate person such as self-direction, self-support and social participation.

> Physical handicap is a state of physical impairment in consequence of which the individual affected is physically incapable of assuming those responsibilities expected of a socially adequate person, such as self-direction, self-support and social participation.

While all residents must meet one of the above-cited definitions in order to gain admittance to one of the state residential schools, the residents have differing degrees of legal and actual capacity. Washington State has four statutory types and levels of incompetency, disability, and guardianship. See RCW 11.88 (1981). Some members of the petitioner class are subject to a judicial determination of incompetency or disability. Such a determination may result in the appointment of a full or total guardianship of person and/or estate, or the appointment of a limited guardian of persons and/or estate.

Other class members have previously been determined incompetent or disabled by

a court, but have no current guardian as their legal representative. Some have actual physical or mental disabilities, known to the state to be sufficient to justify their residence in a state school with their legal competency or disability having not been determined by any court.

RCW 72.33.670 (1981) provides that residents of all state "schools" are required to pay the State of Washington various charges for the cost of care received as residents. The statute establishes the sole and exclusive mechanism for collection. In brief, RCW 72.33.670 (1981) calls for collection from all residents capable of paying all or a portion of monthly charges. A Notice and Finding of Financial Responsibility is served on the guardian of the resident's estate, or, if none has been appointed, upon the spouse or parents or anyone else acting in a representative capacity and

having possession of property belonging to the resident. No provision is made for service on the individual resident, nor for service on any type of court-appointed representative other than a guardian of the estate.

An appeal from the determination of financial responsibility may be made by the guardian of the resident's estate. If no guardian has been appointed, the appeal may be made by certain individuals listed in the statute (see App. C). If no appeal is taken, the Notice and Finding of Financial Responsibility becomes final. The statute makes no provision for appeal by the resident nor for appeal by any court-appointed personal representative, except for the guardian of the estate.

In Duffy v. Social & Health Services, 90 Wn.2d 673, 583 P.2d 470 (1978), the Washington State Supreme Court found RCW 72.33.670 (1981) unconstitutional because

it did not provide service to adult residents not subject to legal declaration of incompetency. As a result of the Supreme Court decision, the Department of Social and Health Services (DSHS) amended its rules and adopted Wash. Admin. Code 275-20-080 (1980).

The regulation provided for personal service upon adult residents who had not been subject to a legal declaration of incompetency. No mechanism for determining actual competency for persons without guardians of the estate has ever been established by the state. RCW 72.33.670 (1981) remains unchanged.

The petitioners seek a refunding of $83,000,000.00 collected from residents of state schools since 1967 under the statute.

II. How Federal Questions Were Raised

1. Trial court

The petitioners filed a complaint in the Superior Court of Washington for Thurston County on March 5, 1979, alleging that RCW 72.33.670 (1981) was subject to constitutional deficiencies (R. at 4). The complaint alleged that the statute violated due process of law as guaranteed by the fourteenth amendment of the United States Constitution, by failure to provide service on adult residents not subject to a legal declaration of incompetency (R. at 15).

The petitioners also alleged in the complaint that the equal protection clause of the fourteenth amendment was violated, as similarly situated residents were classified differently based upon a legislative drafting error or omission and not upon a rational relationship to a legitimate state interest (R. at 16). The complaint also

stated that RCW 49.60.030 (1981) was violated by permitting classification upon the basis of mental competency (R. at 13, 14).

Mutual motions for summary judgment were filed. The trial judge upheld the respondent's summary judgment motion in a memorandum opinion filed June 22, 1981 (see App. B). The trial judge held that the adoption of Wash. Admin. Code 275-20-080 (1980) had cured the due process deficiencies in RCW 72.33.670 (1981), although he also held that the statute was unconstitutional as applied to adult residents not subject to a legal declaration of incompetency served prior to 1976 (R. at 306, 307, App. B, pp. 39, 40). He ruled that the equal protection clause was not violated, as the classification involved was ability to pay, not legal competency (R. at 311, 312, App. B, p. A-52).

The trial court did not address the question of violation of RCW 49.60.030 (1981). Judge Baker found equitable grounds to deny recovery to residents who were served improperly, as ruled in Duffy (R. at 15, App. B, pp. 55-56).

2. The Supreme Court of Washington

The petitioners filed notice of appeal to the Supreme Court of Washington on March 31, 1981 (R. at 318). The appeal alleged error by the trial court in failing to determine that RCW 72.33.670 (1981) violated constitutional requirements under the due process clause of the fourteenth amendment (R. at 318). The petitioners also alleged that the trial court erred in ruling the statute constitutional as applied to one group of individuals but not another, based solely upon legislative drafting error (R. at 319). Finally, the petitioners alleged error by the trial

court in permitting differential application of the statute based upon differences involving mental capacity in violation of RCW 49.60 (1981).

The Supreme Court of Washington accepted the appeal. Briefs were submitted and oral argument was presented. The Supreme Court of Washington affirmed the summary judgment for the respondents. In a written opinion, the court ruled that the service provisions of RCW 72.33.670 (1981) complied with procedural due process under the Constitution:

> DSHS personally served those residents who are not subject to a legal disability. In addition, it serves those residents' spouses, parents or other persons acting in a representative capacity and having property in their possession belonging to the residents, and the superintendent of the schools. We conclude that such notice meets the requirements of due process as it is reasonably calculated to apprise the resident of the proceeding affecting him.

(App. A, p. A-13).

The Supreme Court of Washington also held that RCW 72.33.670 (1981) did not violate equal protection of the laws under the fourteenth amendment. The classification in the statute was said to be between adult residents who were legally competent and more severely handicapped or juvenile residents subject to legal incompetency. The court held this classification to be constitutionally permissible:

> Thus, the distinction is premised on the legal competency of the individual and is rationally related to the purpose of the statute, which is to afford each resident with meaningful notice. Such a distinction does not offend the principles of equal protection.

(App. A, p. A-10).

The court rejected the petitioner's contention that the statute violated RCW 49.60.030 (1981). In the court's view, the classification was based not upon mental or physical handicap, but upon:

> [T]he presence or absence of legal incompetency. The incompetency can be based on age, developmental disability, or severe mental deficiency. RCW 11.88.010(1). There has been no discrimination solely "because of" a mental or physical handicap.

(App. A, pp. 10-11).

Finally, the court affirmed the trial court's ruling that funds collected under improper service between 1967-1976 could be retained by the state, due to principles of unjust enrichment (App. A, p. 17).

REASONS FOR GRANTING THE WRIT

I. The Decision of the Supreme Court of Washington Failed to Recognize That By Statutory Definition, the Mentally and Physically Handicapped Residents of State Institutions Are Individually Incapable of Responding to Notice in a Manner Which Satisfies the Procedural Due Process Requirements of the Constitution

The decision of the Supreme Court of Washington blatantly violates the two most basic principles of procedural due process as continuously enunciated by the Supreme Court of the United States. By validating

the procedure established in RCW 72.33.670 (1981), the court has approved a statutory and regulatory system which provides meaningless paper service and no real opportunity for hearing for a significant number of named petitioners whose property has been taken by the state.

The Washington State Supreme Court ruling allows for the service of a printed form notice to a class of persons who the state knows, by statutory definition, are incapable of understanding such notice. While all petitioners may not be fully legally incompetent, no method is provided for determining actual or legal competency. Additional service is provided to other persons, but no legal relationship or responsibility exists between such other persons and the person whose property is taken.

The decision makes a complete mockery of the concept of meaningful notice and

opportunity for hearing. The Supreme Court of the United States has never deviated from the position that an individual must be provided constitutionally valid procedural due process of law before property can be taken from him. Such due process must include "notice reasonably calculated under all the circumstances to apprise intended parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

The Supreme Court of the United States has stressed the importance of fitting notice to the "practicalities and peculiarities of the case . . .," (id., at 314). It is against the Mullane requirements that the statutory notice provisions and the Supreme Court of Washington's decision must be judged.

The "practicalities and peculiarities" of this case are the physical and mental handicaps of the residents. The statutory definitions of these terms contained in RCW 72.33.020 (1981) focus on the inability of the residents to assume "those responsibilities expected of the socially adequate person, such as self-direction, self-support and social participation . . ." This language is the same in the statute for both physically and mentally handicapped residents. For notice to be meaningful for such persons, their actual abilities must be evaluated and considered.

The Supreme Court of the United States in Covey v. Town of Somers, 351 U.S. 141 (1956), described the procedural due process necessary in dealing with individuals having questionable mental capacity such as the petitioners. In Covey, the Town of Somers attempted to foreclose a tax lien on an individual known by the town to be an

incompetent, but not subject to a legal declaration of incompetency. The town gave notice by publication, posting and mail. There was no question that the individual had actually received notice.

The Supreme Court reversed lower court decisions upholding the notice and subsequent tax lien foreclosures as proper under the due process clause. The Court reflected that the town had known for "upward of 15 years" that the petitioner was actually incompetent and a person "without mental capacity to handle her affairs or to understand the meaning of any notice served upon her." Covey, at 146. The Court held:

> Notice to a person known to be incompetent and without the protection of a guardian does not measure up to this requirement . . . we must hold that compliance with the statute would not afford notice to the incompetent and that a taking under such circumstances would be without due process of law.

(Covey, at 146-147).

Covey is the standard for judging notice to the petitioners. Receipt of a printed form entitled "Notice" is not the same as receiving meaningful notice satisfactory of due process requirements. The Supreme Court of Washington's decision focuses on Covey-like residents; actual but undeclared incompetents. Yet, the Supreme Court of Washington specifically ruled Covey non-germane, although it is factually indistinguishable. The court reasoned that since some residents were only physically but not mentally handicapped, "the state is not put on notice that every resident is unable to comprehend a notice . . .," (App. A, pp. 12-13).

There are fundamental flaws in this reasoning. First, attention must again be called to RCW 72.33.020 (1981), which contains the definition of capacity for residents. Certainly, one of the responsibilities of a socially adequate person,

whether mentally or physically handicapped, is the ability to respond to notice. But, by the statute's definition, all residents are deemed socially inadequate. The state is on notice by its own statute that residents cannot respond.

Secondly, the petitioners have never contended that all residents are totally incompetent for the purposes of responding to notice. But the state and the Supreme Court of Washington cannot argue that this fact excuses the statutory notice provision at issue. The statute has no procedure for establishing the competency or degree of incompetency of residents to determine those able to respond to notice. How can the state contend residents are capable of understanding and responding if, knowing of the statutory definition, the state has no procedure for determining actual competency?

The fact that some residents might be able to respond to notice without aid is of little solace to residents unable to do so. Certainly, for residents who are actual but undeclared incompetents, the present procedure violates due process. While the state cannot presume the incompetency of residents, in light of its own statutory definition of the population involved, it certainly cannot presume competency, as the Supreme Court of Washington allows.

The Supreme Court of Washington also erroneously held that service on residents' spouses, parents or others acting in a quasi-fiduciary capacity, as outlined in RCW 72.33.670 (1981), coupled with service on the residents, comported with due process (App. A, p. A-13).

Presumably, the court felt that such service was necessary because service on the residents alone would not comply with due process. Such other individuals have

no more legal right to act on behalf of adult residents without the establishment of a legal guardianship than a complete stranger. As the court expressly held in Duffy, supra, the property is under the legal control of the resident only.

In Covey, the Supreme Court ordered a two-step relief, which is also called for in the present case. First, the property that had been taken was to be returned, as it had been taken without due process. Second, the court implied that a guardian must be appointed upon whom proper service could be made. Covey dictates that the money collected pursuant to constitutionally deficient service from residents who are known to be incompetent, even though not subject to a legal declaration of disability, must be returned.

Any further collection should occur only after guardians ad litem have been appointed for residents not subject to a

legal declaration of incompetency. If residents are determined competent to respond to notice, they can be served. If a resident is determined incompetent to respond to notice, a guardian must be appointed to receive notice on his or her behalf.

The above described procedure will not be inexpensive. But financial cost is an irrelevant consideration when dealing with the remedy for a denial of due process of law, as has occurred here. Goldberg v. Kelley, 397 U.S. 254 (1970). The state has denied due process and should not be heard to plead that it cannot pay for its error.

II. The Decision Below Incorrectly Upholds a Distinction Between Identically Situated Individuals in the Face of Equal Protection Arguments, With the Distinction Caused By Legislative Drafting Error Without Any Rational Basis

The Supreme Court of Washington erroneously concluded that allowing collection under RCW 72.33.670 (1981) from

some identically situated residents, but not others, did not violate equal protection of the laws as guaranteed by the fourteenth amendment. The "rational relationship" test for equal protection requires that a classification under a statute "be rationally related to a legitimate state interest." New Orleans v. Dukes, 427 U.S. 297 (1976). The court ignored the fact that the classification in RCW 72.33.670 (1981) obviously occurred due to a legislative drafting error, and then compounded its mistake by inferring legislative intent which clearly didn't exist.

The intent of the Washington Legislature was explicitly spelled out in RCW 72.33.650 (1981):

> The purpose of RCW 72.33.670 through 72.33.700 is to place the responsibility for cost of care, support and treatment upon those residents of state residential

> schools who possess assets over and above the minimal amount required to be retained for personal use . . .

Clearly, the Legislature intended the "class" under the statute to be all residents able to pay. However, through legislative drafting error, the Legislature failed to provide any notice or opportunity for hearing to adult residents who did not have guardians of their estates. The Supreme Court of Washington correctly ruled in Duffy v. Social & Health Services, 90 Wn.2d 673, 583 P.2d 470 (1978), that due process required personal service on adult residents not subject to a legal declaration of disability, thus invalidating collections from those individuals under the deficient statute.

After Duffy, collection of funds from any other residents, under RCW 72.33.670 (1981), while not collecting from the persons protected by Duffy, violated equal protection of the laws. Again, the class

intended by the legislative scheme was all residents financially able to pay for care. Those properly served under the statute had to continue paying. Those omitted from service by the drafting error, although also able to pay, were, after Duffy, exempt from collection. Identically situated residents were classified differently due to a legislative mistake, not a "rational relation to a legitimate state interest."

Incredibly, in this case, the Supreme Court of Washington ignores its own holding in Duffy by allowing continued collection, regardless of judicially determined incompetency, under RCW 72.33.670 (1981). The court presumes that the Legislature intended to classify residents based upon legal competency (App. A, p. A-8). The court reasoned that residents competent

to respond to notice should be personally served. However, residents judged legally incompetent should not be served, as they could not respond to notice effectively (App. A, p. A-9).

This is certainly a commendable goal. Unfortunately for the court, the Washington Legislature never stated, implied or intended such a classification. The statute is silent as to service on adult residents who do not have a guardian of the estate. The statute's silence concerning service on such residents is explicitly the basis used by the Washington State Supreme Court in the Duffy case for declaring the service provisions constitutionally defective for persons not declared incompetents (and, presumptively, for all others not having a guardianship of the estate).

The court's ruling in this case upholds as constitutionally valid, service on adult residents not subject to a legal

declaration of incompetency. This apparently overcomes the Duffy determination that the statutory method provided is constitutionally defective. Yet, RCW 72.33.670 (1981) has not subsequently been amended and remains silent as to the "presumed legislative intent" that the court's decision hinges upon.

Even if the statute was amended to provide for personal service on adult residents not subject to both a declaration of incompetency and appointment of a guardianship of the estate, Argument I of this petition still demonstrates the constitutional deficiencies of the present notice procedures allowed by Wash. Admin. Code 275-20-080 (1980). The statute must fall on equal protection grounds, as well as due process grounds.

III. The Supreme Court of Washington Validated an Impermissibly Vague Statute Which Provides no Authority or Guidance for a Method of Service or Opportunity for Hearing for Residents Not Named in the Statute, Thus Allowing Collection From Such Residents Based Upon the Discretionary Whim of State Officials

The Supreme Court of Washington compounded its error in its equal protection analysis by refusing to strike down RCW 72.33.670 (1981) on grounds of vagueness and/or impermissible discretion. The statute speaks only to service upon residents with a guardian of the estate. It is silent as to residents who have guardians of the person, residents found legally incompetent but without guardians of the person and/or estate, residents declared partially disabled and those residents not subject to a legal declaration of incompetency at all, all of whom are represented by name as plaintiffs in this action. Duffy and the opinion in this case deal

exclusively with residents not subject to a legal declaration of incompetency, and the manner of service on them.

The result is impermissible discretion allowed to state officials in determining whether to collect from and the manner of service upon those residents not mentioned in the statute. There is nothing in the statute which can offer guidance. Collection from residents not mentioned in the statute should occur under the clear guidance of the Legislature, as evidenced by its statutory command in RCW 72.33.670 (1981), not at the whim or desire of state officials absent statutory methods.

To explain the dangers inherent in the present situation, an analogy can be drawn to cases dealing with the right of freedom of expression under the first amendment to the Constitution. The Supreme Court of the United States has consistently held statutes unconstitutional which permit public

officials to issue or withhold permits for parades, refuse to permit leafleting, and limit other forms of expression, based upon the official's discretion, where no clear guidelines exist in the statute. See Lovell v. Griffin, 303 U.S. 444 (1938); Staub v. Baxley, 355 U.S. 313 (1958). The court has recognized the dangers in making the exercise of freedom of speech "contingent upon the uncontrolled will of an official." Staub, at 322.

In view of the importance of the right involved here, the right to notice and opportunity to be heard before deprivation of property, the same reasoning is applicable. As mentioned above, there is no guidance in the statute as to collection from residents not expressly mentioned in the statute. Collection from residents with only a guardian of the person, or residents who have actual but non-judicially declared incompetency, is clearly

contingent upon the uncontrolled will of the state officials. The possibility of the arbitrary exercise of power must be coupled with the inherent vagueness of the statute to rule it inoperable as to residents who are not designated to be served notice by the statute.

In criminal law concepts, another analogy is pertinent. It is a longstanding principle of constitutional law that criminal statutes which are facially vague, such that adequate notice is not provided "to a person of ordinary intelligence that his contemplated conduct is illegal," Buckley v. Valeo, 424 U.S. 1 (1976), are unconstitutional. The vagueness doctrine has been extended beyond the area of criminal law and a "state statute must meet the challenge that it is unconstitutionally vague whether it is labeled penal or not." Giaccio v. Penn, 382 U.S. 399 (1966).

RCW 72.33.670 (1981) goes beyond mere vagueness. The statute makes no mention of service upon residents with only a guardian of the person or legally incompetent residents without guardians. There is certainly no warning in the statute to those residents of the state's procedures against them, and the statute must be ruled unconstitutional on grounds of vagueness.

IV. If RCW 72.33.670 (1981) Is Invalid on Either Due Process or Equal Protection Grounds, the Statute Violates RCW 49.60.030 (1981), the Washington Anti-Discrimination Law

The Supreme Court of Washington erroneously concluded that RCW 72.33.670 (1981) did not violate RCW 49.60.030 (1981), the Washington Anti-Discrimination Law. If the statute is found unconstitutional due to violation of either the due process clause or equal protection clause, allowing continued collection from some residents, but not others solely based upon

mental incompetency, the result is discrimination on the basis of mental handicap.

RCW 49.60.030(1) provides:

> The right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental or physical handicap is recognized as and declared to be a civil right.

The Washington Supreme Court concluded that the classification resulting from its decision "is based upon the presence or absence of legal incompetency," (App. A, p. A-10). There is little difference between a statute based upon legal incompetency or mental handicap, which RCW 49.60.030(1) (1981) prohibits. One simply results in the other and, thus, the court's own reasoning acknowledges that the statute is based upon impermissible classification.

Since the Washington courts failed to require conformance to constitutional mandates, it falls to the Supreme Court of the United States to do so. A ruling by

the Supreme Court of the United States that RCW 72.33.670 (1981) is unconstitutional, due to the improper service and appeal provisions under the due process clause of the fourteenth amendment, would mean that no collection could occur from adult residents not subject to a legal declaration of disability. Collection from residents who are subject to a legal declaration of disability would constitute collection based upon a mental or physical handicap. This would violate RCW 49.60.-030(1) (1981).

Alternatively, the court could rule that RCW 72.33.670 (1981) is unconstitutional under the equal protection clause, because it permits collection from residents subject to a guardianship of the estate while omitting, due to lack of proper service, collection from similarly situated residents, without such specific guardianships. If so, this would mean

collection violated RCW 49.60.030(1) (1981), as again, it would be based on mental handicap.

In either case, RCW 49.60.030(1) (1981) would be violated, as some residents would be discriminated against. The petitioners should then be allowed, under RCW 49.60.030(2) (1981), to "recover the actual damages sustained by him . . . together with the costs of suit, including reasonable attorneys' fees . . ."

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Washington.

DATED this 25th day of October, 1982.

Respectfully submitted,

SWEET, DUSSAULT, NEFF &
GIBBS, P.S.
By: WILLIAM L. E. DUSSAULT
Attorneys for Petitioners

APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

FOUNDATION FOR THE HANDICAPPED, a Washington, not-for-profit corporation; GERALD DUNN; STEPHEN MADDOX, by and through his guardian ad litem, THE FOUNDATION FOR THE HANDICAPPED; PEGGY JEAN WIGINGTON, by and through her guardian ad litem, THE FOUNDATION FOR THE HANDICAPPED; DONALD WOODWARD, by and through his guardian ad litem, THE FOUNDATION FOR THE HANDICAPPED; THEODORE BROWN, by and through his guardian ad litem, THE FOUNDATION FOR THE HANDICAPPED; LEONA WAKEFIELD, by and through her guardian ad litem, THE FOUNDATION FOR THE HANDICAPPED; GARY JENKINS, by and through his guardian, LINDA DUFFY; and JACK FURLAN, by and through his guardian, ELSIE GRANATA, Appellants, v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES OF WASHINGTON STATE, JERALD J. THOMPSON, in his official capacity as Director of the Department of Social and Health Services, and SLADE GORTON, in his official capacity as Washington State Attorney General, Respondents.	No. 47658-6 EN BANC Filed Jul 29 1982

DIMMICH, J.--This is a class action, brought on behalf of all persons currently

residing in one of the State's five residential schools for the mentally and/or physically handicapped and all persons having resided in the schools for a period of time since 1967, seeking to have the statute providing for collection of monies for their care declared unconstitutional and for restitution by the Department of Social and Health Services (DSHS) of approximately $83 million. The trial court granted summary judgment in favor of DSHS. We affirm.

Appellant, the Foundation for the Handicapped (Foundation), is a nonprofit corporation. It serves as legal guardian, limited guardian or representative payee, as appropriate, for individuals who are residents of the state schools. The individually named appellants are residents of the state schools which are designed and operated for the education, guidance, care, treatment and rehabilitation of handicapped

persons. RCW 72.33.020(4). The residents include persons mentally and/or physically handicapped.[1] Some residents are subject to a legally declared disability requiring the appointment of a full or limited guardian; others, however, are not legally incompetent.[2]

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[1]A mental handicap is defined as: "a state of limited development in consequence of which the individual affected is mentally incapable of assuming those responsibilities expected of the socially adequate person such as self-direction, self-support and social participation." RCW 72.33.020 (1). Prior to 1977 the first part of the definition differed. It read: "a state of subnormal development of the human organism". Laws of 1957, ch. 102, § 2(1). A physical handicap is similarly defined as "a state of physical impairment in consequence of which the individual affected is physically incapable of assuming those responsibilities expected of the socially adequate person such as self-direction, self-support and social participation." RCW 72.33.020(2). This definition is essentially the same as when first enacted. Laws of 1957, ch. 102, § 2(2).

[2]It is well settled law that a person is presumed competent. In re Burnett, 30 Wn.2d 160, 191 P.2d 283 (1948). A person may be declared incompetent, thus allowing a court to appoint a guardian, only when he

The State, through DSHS, provides all residents with board, room, clothing, medical treatment as well as educational opportunities commensurate with their respective abilities. Prior to 1967, the State did not charge residents or their families for this care. In 1967 the Legislature adopted RCW 72.33.650-.700, placing financial responsibility for costs of care, suppoart and treatment upon those residents who possess assets over and above the minimal amount required for personal use. We upheld the State's ability to charge the residents and approved the statutory exemptions and provisions for

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is under the age of majority or when he is: "(b) Incompetent by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, of either managing his property or caring for himself or both." (Italics ours.) RCW 11.88.010(1).

handling the residents' money in O'Connell v. Conte, 76 Wn.2d 280, 456 P.2d 317 (1969). RCW 72.33.670 provides that after a determination is made that the estate of the resident is able to pay all or any portion of the monthly charges a notice and finding of financial responsibility is to be served on the resident's guardian. If there is no guardian, the notice is to be personally served on the resident's spouse, parent, or other person acting in a representative capacity and having property in his possession belonging to the resident, and the superintendent of the schools. Those same representatives have the right to appeal the determination of financial responsibility.

DSHS proceeded under RCW 72.33.670 until 1976 when a trial court in favor of a representative payee of a resident who challenged a finding of financial responsibility on the grounds that the statute

denied the particular resident due process of law. We agreed and held:

> The statute makes no provision for service upon the resident himself. For most residents, this is apparently unnecessary, as most are under legal disability as a result of their minority and/or the appointment of a legal guardian. However, Gary Jenkins is not subject to any legally declared disability. As a result, the statute is defective as applied here in failing to provide for notice to Gary Jenkins. DSHS did not serve notice upon him, thus making no attempt to correct the statutory defect. Due process requires notice reasonably calculated to appraise a party of proceedings which will affect him.

Duffy v. Department of Social & Health Servs., 90 Wn.2d 673, 678-79, 585 P.2d 470 (1978).

I

The Foundation in the instant action renews the challenge to the statute's service and appeal requirements. It requests the court to declare RCW 72.33.670 unconstitutional in its entirety. We adhere to our holding in Duffy that RCW

72.33.670 is only unconstitutional as applied to a specific factual situation--when a resident is not subject to a legal disability. A statute held invalid as applied is not void on its face or incapable of valid application in other circumstances. 1 J. Sutherland, Statutory Construction § 2.06 (4th ed. 1972).

II

The Foundation alternatively contends that our holding the statute unconstitutional as applied to some residents but constitutional as to others violates equal protection guaranties as well as Washington's Law Against Discrimination, RCW 49.60. Such claims are without merit.

The equal protection analysis must begin with the premise that the statute is presumptively valid. State v. Rhodes, 92 Wn.2d 755, 600 P.2d 1264 (1979). The Foundation has the burden of proving that the statute is invalid. State v. Kent, 87

Wn.2d 103, 549 P.2d (1976). The extent of the burden varies according to the nature of the rights involved. If a fundamental constitutional right or a "suspect" classification is at issue, courts employ a strict scrutiny test and the classification will be upheld only if a compelling state interest justifies the classification. Darrin v. Gould, 85 Wn.2d 859, 540 P.2d 882 (1975). If, not, the statute will be upheld if it is rationally related to a legitimate governmental objective. State v. Smith, 93 Wn.2d 329, 336, 610 P.2d 869 (1980).

The "classification" in the present case is between Duffy-type adult residents, who are legally competent, and more severely handicapped or juvenile residents who are subject to legal incompetency. All juveniles are in the latter category. Thus, the distinction is not, as the Foundation contends, between severely

handicapped and less severely handicapped persons. Rather, the distinction is between those who have been deemed legally incompetent requiring a guardian to manage their affairs and those who have not. Such a distinction in our view does not amount to a suspect classification. Therefore, the rational basis test is the proper standard of review.

Since juveniles and more severely handicapped adults are less likely to comprehend the personal notice required to be served upon Duffy-type residents, we find a rational basis for distinguishing between the two groups. The rights of handicapped persons subject to a legal disability are best protected by notice to a guardian or other representative. Less handicapped persons not subject to a legal disability are more apt to understand the notice and should be permitted an opportunity to respond on their own behalf as

well as through their representatives. Thus, the distinction is premised on the legal competency of the individual and is rationally related to the purpose of the statute, which is to afford each resident with meaningful notice. Such a distinction does not offend the principles of equal protection.

Similarly, this classification does not violate Washington's Anti-Discrimination Law. RCW 49.60.030(1) provides that the right to be free from discrimination because of the presence of a mental or physical handicap is a civil right. The Foundation contends that basing the type of notice that is required on the extent of the residents' handicaps constitutes illegal discrimination. We do not agree. As noted above, the classification is based upon the presence or absence of a legal incompetency. The incompetency can be based upon age, developmental disability,

or severe mental deficiency. RCW 11.88.-010(1). There has been no discrimination solely "because of" a mental or physical handicap. Furthermore, no resident has been disadvantaged by the classification. Handicapped persons under a legally declared disability presumably would not benefit from the actual notice which legally competent residents must receive.

III

In 1976, DSHS began personally serving notices and findings upon those residents who were not subject to a legal disability in addition to serving the representatives listed in RCW 72.33.670. In 1979, after the Duffy due process decision, DSHS formalized these procedures by adopting WAC 275-20-080 thus supplying the service provision which RCW 72.33.670 lacked. The Foundation challenges the adequacy of this service and the validity of the administrative rule.

Appellants contend that there is not one resident who is able to comprehend the contents of the notices. They rely upon Covey v. Somers, 351 U.S. 141, 100 L. Ed. 1021, 76 S. Ct. 724 (1956) and In re Hendrickson, 12 Wn.2d 600, 123 P.2d 322 (1942), as support for its position that service upon the residents is meaningless and thus inadequate. In Covey the Court held service of a notice on a person everyone actually knew to be incompetent in that that she was without mental capacity to handle her affairs or to understand the meaning of any notice was insufficient. In In re Hendrickson this court assailed a statute allowing notice of sterilization to be personally served on a person held in confinement because of mental incompetency without notice to any other representative.

These cases are nongermane to the situation at bar. The relevant statutes unmistakably provide that residents of the

state schools include physically handicapped persons. Mental incompetency is not a requisite to admission. Accordingly, In re Hendrickson does not apply nor does Covey since the State is not put on notice that every resident is unable to comprehend a notice pursuant to the applicable definitions and statutes.

DSHS personally serves those residents who are not subject to a legal disability. In addition, it serves those resdents' spouses, parents or other persons acting in a representative capacity and having property in their possession belonging to the residents, and the superintendent of the schools. We conclude that such notice meets the requirements of due process as it is reasonably calculated to apprise the resident of the proceeding affecting him. Duffy, at 679.

However, DSHS did not begin properly serving the residents and allowing adequate

opportunity to be heard until 1976, at which time it also searched the records and attempted to serve all who had been residents since 1967. The State argues that since it served all residents not under a legally declared disability who had resided in the schools since 1967 such service retroactively cured the statute. Such an argument is unacceptable as the United States Supreme Court has stated that the notice and opportunity to be heard must be at a meaningful time, i.e., prior to terminating public assistance payments, Goldberg v. Kelly, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970). Proper service and an opportunity to appeal afforded after the State has charged a resident's estate is insufficient.

Appellants challenge the authority of DSHS to adopt WAC 275-20-080 curing the statute's deficiency. This rule

was adopted in accord with the Legislature's grant of general duties and powers to DSHS to collect monies from all residents able to pay the costs of their care, treatment and education. RCW 72.33.650-.700. As instructed in Pacific Cy. v. Sherwood Pac., Inc., 17 Wn. App. 790, 794-95, 567 P.2d 642 (1977):

> A statute expressly granting general authority to achieve a lawful objective includes by implication the right to do such acts as may be reasonably necessary to achieve the objective. State v. Melton, 41 Wn.2d 298, 248 P.2d 892 (1952); State ex rel. Hunter v. Superior Court, 34 Wn.2d 214, 108 P.2d 866 (1949); State ex rel. Becker v. Wiley, 16 Wn.2d 340, 133 P.2d 507 (1943); 56 Am. Jur. 2d §§ 195, 226 (1971); 2A C. Sands, Statutes and Statutory Construction § 55.04 (4th ed. 1973).

Since the Legislature granted general collection powers to DSHS, it must have intended that the statute be construed to permit and require personal service on all persons constitutionally entitled thereto

because such service is reasonably necessary to achieve the objective of the collection program. It would lead to absurd consequences, which we must avoid in statutory construction, if the agency is given the right to collect from all residents but not the authority to perform those acts necessary to that end. Accordingly, we uphold DSHS's power to adopt WAC 275-20-080.

In sum, we hold that personal service of a notice and finding of financial responsibility on a resident not subject to a legally declared disability in addition to serving those representatives listed in the statute and allowing those residents an opportunity to appeal the determination of financial responsibility comports with due process and has been effective since 1976. However, those residents not subject to a legal disability whose estates were charged

for their care in the years 1967 through 1976 were denied dur process of law.

IV

The trial court allowed the State to retain funds collected from those residents between 1967 and 1976 on alternative equitable grounds. We affirm on the basis of unjust enrichment. "'The doctrine of unjust enrichment is that one shall not be allowed to profit or enrich himself at the expense of another contrary to equity.'" Lloyd v. Ridgefield Lbr. Ass'n., 38 Wn.2d 723, 736, 231 P.2d 613 (1951). Clearly the residents received a benefit from the services provided by the State. See Olwell v. Nye & Nissen Co., 26 Wn.2d 282, 285, 173 P.2d 652 (1946).

The Foundation has never alleged that DSHS engaged in overreaching when dealing with the residents of the schools. Nor does it contend that DSHS collected too much money from any individual. The

average monthly per capita cost of operating a state residential school in 1967 was $296; in 1979 the cost exceeded $1,475. The average monthly payment received from a paying resident is approximately $120. The State has collected money from only 40 percent of all residents for the costs of their care, treatment and education and only about six residents have had sufficient assets to pay their full share of the per capita costs of operating the school. The source of 97.5 percent of these funds is social security benefits. The remainder is veteran benefits, railroad retirement benefits and trust accounts. These funds, although grossly inadequate, were designed to provide the very type of care DSHS provided. Furthermore, it is well settled that the State is not required to provide all the funds to support the residential schools. See State v. Pierce Cy, 132 Wash. 155, 231 Pac. 801 (1925); State ex rel. Bd.

of Comm'rs v. Clausen, 95 Wash. 214, 163 Pac. 744 (1917). See also O'Connell v. Conte, supra; Duffy, supra. Accordingly, the State is not required to reimburse the money is has already utilized in caring for the residents. Additionally, the costs to the State, if required to repay the money collected between 1967 and 1976, would be great. The administrative costs of searching through old files and records alone would impose a tremendous financial burden on DSHS. We have recognized retroactive class relief will be denied if it places an undue financial burden on the State. Hanson v. Hutt, 83 Wn.2d 195, 204, 517 P.2d 599 (1973).

In light of these considerations, we affirm the trial court's summary judgment.

/s/ _____

We Concur:

/s/ _____ /s/ _____

/s/ _____ /s/ _____

/s/ _____ /s/ _____

/s/ _____ /s/ _____

APPENDIX B

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

FOUNDATION FOR THE HANDICAPPED,	)	
Plaintiffs,	)	
vs.	)	No. 79-2-00258-2
DEPARTMENT OF SOCIAL AND HEALTH SERVICES, et al.,	)	
Defendants.	)	

REPORT OF PROCEEDINGS

(December 30, 1980, and March 18, 1981)

81 JUN 22 P12:08

BY/s/
DEPUTY

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

FOUNDATION FOR THE HANDICAPPED,	)	
Plaintiffs,	)	
vs.	)	No. 79-2-00258-2
DEPARTMENT OF SOCIAL AND HEALTH SERVICES, et al.,	)	REPORT OF PROCEEDINGS
Defendants.	)	

BE IT REMEMBERED That heretofore and on, to wit, the 30th day of December, 1980, and the 18th day of March, 1981, the above-entitled and numbered matter came on for hearing before the Honorable FRANK E. BAKER, Judge of the Superior Court of the State of Washington, in and for the County of Thurston, stting at Olympia without a jury.

APPEARANCES:

The Plaintiffs herein being represented by MR. WILLIAM L. E. DUSSAULT, Attorney at Law;

The Defendants herein being represented by MR. ROBERT M. MCDONALD, Assistant Attorney General.

WHEREUPON, the following proceedings were had and done, to wit:

(December 30, 1980.)

(Whereupon, there were arguments and colloquy pertaining to the aforementioned matter.)

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

FOUNDATION FOR THE HANDICAPPED,	)	
Plaintiffs,	)	
vs.	)	No. 79-2-00258-2
DEPARTMENT OF SOCIAL AND HEALTH SERVICES, et al.,	)	MEMORANDUM OPINION
Defendants.	)	

This matter came regularly on to be heard upon cross-motions for summary judgment. The Court has examined the entire file including all motions, affidavits and pleadings, read all briefings therein, to-wit: Memorandum in Support of Plaintiffs' Motion for Summary Judgment, Defendants' and Counter-Claimants' Brief in Support of Summary Judgment, Memorandum in Response to Defendants' and Counter-Claimants' Brief in Support of Summary Judgment,

Defendants' and Cross-Claimants' Counter-Brief in Support of Summary Judgment, Defendants' and Cross-Claimants' Reply Brief and Plaintiffs' Post Argument Memo, and having further entertained Oral Argument, now enters its Memorandum Opinion.

The individual claimants and plaintiffs in this action are all alleged members of a class, some of which either currently reside at one of the five state residential schools as provided by the State Constitution and applicable statutes pertaining thereto, or have resided at one of such schools for some period of time since July 1, 1967.

Each plaintiff falls within one of four categories, specifically as follows: Some members are currently under Court appointed full or limited guardians, subject to a determination of incompetency or disability. Some have previously been determined incompetent or disabled by a

Court, but have no current guardian as their legal representative. Some have an actual mental or physical disability, justifying the appointment of a "representative payee" under various state and federal statutes, and finally some have actual physical or mental disabilities sufficient to justify their residence in a state residential school with their legal competency or disability having not been determined.

The residents of these state schools are provided generally with the necessities of life including board, room, clothing, medical treatment, as well as educational opportunities commensurate with their respective abilities. As a part of the statutory scheme, such residents have been charged from their individual estates an amount based upon the average monthly cost of operating their respective school. However, only those who possess assets over

and above the minimal amount required to be retained for personal use are legally responsible for such services as provided. None of the plaintiffs have ever paid his or her full per capita share of the cost of operating their respective schools.

The Court agrees with counsel that the primary and foremost question to be answered is whether the provisions of RCW 72.33.670 meet the constitutional requirements of due process. Plaintiffs allege that the collection procedure set forth within the statute is unconstitutional and that as a result all residents are entitled to be reimbursed for all monies paid on account for their care and treatment. It is further alleged that since no provision for proper service is provided for those residents who have not been declared legally incompetent or disabled that the statute is not severable and therefore all residents whatever be their category must

be reimbursed from July 1, 1967 forward. It is further alleged that the entire statute being unconstitutional such residents are entitled to the same status as prevailed prior to 1967 necessitating the State to foot the entire cost of the services provided.

It needs no citation to state that legislative enactments by way of statute are presumed to be constitutional and the Court cannot find such statute unconstitutional unless it appears to be so beyond a reasonable doubt. The Court must adopt a construction which will sustain its constitutionality if at all possible. Where the trial court is called upon to determine the constitutionality of a statute, unless a statute is manifestly and plaintly [sic] unconstitutional, a trial court should sustain it.

However, the Constitution is not a grant, but a restriction on the law-making

power, and the power of the legislature to enact all reasonable laws is unrestrained except where, either expressly or by fair inference, it is prohibited by the state and federal constitutions. If, in fact, such enactment violates due process as alleged herein, the Court will not shut its eyes to obvious facts which compel an unconstitutional conclusion. Even though the policy or purpose of the legislative intent might be laudable, that in itself is not sufficient reason to uphold a statute.

To interpret statutory constitutionality and severability of a part thereof, the Court must look to all provisions within the Chapter to determine legislative intent as related to the challenged portion.

First of all, the purpose of the Chapter is enunciated in RCW 72.33.010 which, generally, is to rehabilitate,

whenever possible, the mentally and physically handicapped residents under care and thus facilitate as well as culminate in their return to society. To carry out this purpose the provisions of the Chapter are to be given a liberal construction so that those qualifying shall receive the benefits of such residential facilities while still preserving "all rights and privileges guaranteed the person by the Constitution of the United States of America and the State of Washington." See RCW 72.33.900.

As a part of the package the legislature has seen fit to monetarily assess, under certain conditions, the estates, if any, of the respective residents. This charge is exemplified by RCW 72.33.650 which statute kicks off the necessary procedures for the imposition of such financial responsibility. It provides:

> "72.33.650. Financial responsibility for costs of care, support

> and treatment of residents -- Declaration of purpose. The purpose of RCW 72.33.650 through 73.33.700 is to place financial responsibility for cost of care, support and treatment upon those residents of state residential schools who possess assets over and above the minimal amount required to be retained for personal use; to provide procedures for establishing such liability and the monthly rate thereof, and the process for appeal therefrom to the secretary of social and health services and the courts by any person deemed aggrieved thereby. (1967 c 141 § 1.)"

It should also be noted that under this statutory scheme beginning with RCW 72.33.650 through RCW 72.33.700 the exemptions provided and the handling of residents monies have been approved in O'Connell vs. Conte, 76 Wn.2d 280. Nor can the right to charge or at least to impose a part of the financial responsibility upon the individual resident be challenged:

> "We find that the challenged legislation is a legitimate attempt by the legislature to reduce the burden on the taxpayer by forcing the estate of each resident to shoulder a share of the costs of his care and maintenance.....We therefore hold

> that these provisions in the 1967 act are reasonable classifications of persons and estates and are not in violation of the equal protection clause of the fourteenth amendment to the Constitution of the United States." Conte, supra.

RCW 72.33.655 in effect provides that each resident shall be liable for his or her per capita cost of care, support and treatment, and RCW 72.33.660 gives a basis for such liability, providing that such charges shall be based upon the per capita costs of operating the schools giving to the Department the rule making power to implement the necessary computations. RCW 72.33.665 gives the Department the right to investigate the estates of each resident and determine the ability to pay. RCW 72.33.680 provides for vacation and modification procedures after findings of financial responsibility or lack thereof. RCW 72.33.685 makes any charges to the resident payable in advance of services being provided, but RCW 72.33.690 notwithstanding

the provisions in .685, provides a procedure for reimbursement from after acquired property. RCW 72.33.695 and RCW 72.33.700 are not material to the Court's discussion herein.

The statutes cited above set forth all the necessary elements to carry out the program with the exception of what plaintiffs call the "collection procedure" set forth in RCW 72.33.670 which statute is the focal point of plaintiffs constitutional attack. It provides as follows in its entirety:

> "72.33.670 Financial responsibility for costs of care, support and treatment of residents -- Notice and finding of financial responsibility -- Service -- Appeal -- Hearing. In all cases where a determination is made that the estate of a mentally or physically deficient person who resides at a state residential school is able to pay all or any portion of the monthly charges, a notice and finding of financial responsibility shall be personally served on the guardian of the resident's estate, or if no guardian has been appointed then to his spouse or parents or other person

acting in a representative capacity and having property in his possession belonging to a resident of a state residential school and the superintendent of the state residential school. The notice shall set forth the amount the department has determined that such estate is able to pay per month, not to exceed the monthly charge as fixed in accordance with RCW 72.33.660, and the responsibility for payment to the department of social and health services shall commence thirty days after personal service of such notice and finding of responsibility. An appeal from the determination of responsibility may be made to the secretary by the guardian of the resident's estate, or if no guardian has been appointed then by his spouse, parent or parents or other person acting in a representative capacity and having property in his possession belonging to a resident of a state residential school, within such thirty day period upon written notice of appeal being served upon the secretary by registered or certified mail. If no appeal is taken, the notice and finding of responsibility shall become final. If an appeal is taken, the execution of notice and finding of responsibility shall be stayed pending the decision of such appeal. Appeals may be heard in any county seat most convenient to the appellant. The hearing of appeals may be presided over by a hearing examiner and the proceedings shall be recorded either manually or by a mechanical device. Any such appeal

> shall be a "contested case" as defined in RCW 34.04.010, and practice and procedure shall be governed by the provisions of RCW 72.33.650 through 72.33.700, the rules and regulations of the Department of Social and Health Services, and the Administrative Procedure Act, chapter 34.04.

After the investigation and determination to pay has been determined in accordance with the statutes above set forth, .670 provides for service of a "Notice of Finding of Financial Responsibility" as follows:

1. On the guardian of the resident's estate, or if no guardian,
2. Then upon his spouse or parents, or
3. Other person acting in a representative capacity and having property in his possession belonging to a resident, and
4. The superintendent of the school.

There is no requirement for service upon the resident when such resident has not been declared incompetent nor has suffered under a legal disability. The right of appeal is directed to the same

individuals sans the superintendent, and thus there is also no right of appeal by any individual resident who has not been legally declared incompetent nor under such disability. Legally, all people are presumed competent until declared otherwise by proper authority.

Plaintiffs claim that by the omission of service on such residents and by not providing them with appeal rights there has been a violation of the Constitutional rights of such residents by the deprivation of their property without due process under the XIV Amendment to the United States Constitution and Article I, Section 3 of the State Constitution. In support of these contentions they cite primarily three cases: Duffy v. Social and Health Services, 90 Wn.2d 673; Covey v. Town of Somers, 351 U. W. 141 and In re Hendrickson, 12 Wn. 2d 600. The Court shall discuss each separately in this Opinion.

Duffy, supra,. as it pertains to this case, was a pure question of failure of proper notice under the provisions of RCW 72.33.670. Jenkins was a resident of Rainier School and had been placed there because of his developmental handicaps. At the time in question, Jenkins had no legal guardian and, since reaching the age of majority, had not been declared incompetent or placed under legal disability. Justice Utter posed the limited question in the case: "Is the procedure followed in this case violative of due process principles because no notice of the administrative action was directed to Gary Jenkins? (Underlining mine.)

The Court held that the procedure followed was unconstitutional stating:

> "The statute makes no provision for service upon the resident himself. For most residents, this is apparently unnecessary, as most are under legal disability as a result of their minority and/or the appointment of a legal guardian. However,

> Gary Jenkins is not subject to any legally declared disability. As a result, the statute is defective as applied here in failing to provide for notice to Gary Jenkins. DSHS did not serve notice upon him thus making no attempt to correct the statutory defect. Due process requires notice reasonably calculated to apprise a party of proceedings which will affect him. (citations) The due process requirement of notice to a party before a determination affecting his property is made applies to administrative hearings." (citations) (Underlining mine.)
>
> "The property, although in the hands of the representative payee, is still property of Gary Jenkins and no determinations regarding that property can be made without notice to him or a legally appointed guardian."

As a result of this decision of our Supreme Court, the Department subsequently amended its rules and provided in WAC 275-20-080 "In those cases where a resident is an adult acting under no legal disability, such notice and finding of financial responsibility shall be personally served on him or her." Since Duffy, supra, the legislature has not seen fit to amend the

statute to include the required service. Proper service has now been made upon all residents both present and/or retroactive.

Plaintiffs argue the omission in the statute as to Jenkins negates the entire statute; became a nullity and void ab initio. It is argued such unconstitutionality dates from the time of its enactment and not merely from the date of the decision of our Supreme Court. Defendant argues the Duffy decision, supra, does not render the statute unconstitutional in whole or in part, or in the alternative, such deficiency as to Jenkins has been cured by actual service upon such adult residents who are under no legally declared disability.

The intent of the legislature in adopting the service requirements under RCW 72.33.670 was to cover all residents qualified to be placed in the respective schools. It seems obvious the legislature,

through inadvertence, failed by not providing for those found to be under no legal disability. Just why our legislature has not amended the statute to overcome the deficiency and provide due process to the specific category is beyond comprehension.

However, the Department, based upon Duffy, supra, adopted the above rule. It would appear, by dicta, the Supreme Court has held that had procedural service been made upon Jenkins the due process requirement would have been cured.

The Court is well aware rule making power is delegated to an agency to implement the provisions and directives of the statute. No agency may adopt rules which exceed the authority granted. The statute being silent as to the category in question, it is difficult for this Court to agree with the directive in Duffy, supra. The only rational conclusion this Court can make is that since the legislature intended

to cover all residents by way of service, which is procedural in nature, the adoption of the rule may be implied from the legislative intent. The Court may then by its decision and inherent power and authority correct the statutory defect without legislative enactment. Therefore, this Court holds that service under the rule, for both the present and future is sufficient. However, since the statute is unconstitutional as to Jenkins, the Court does not find retroactive application for the statute is of no force or effect and void ab initio.

The Court in Duffy, supra, was very careful in directing its decision to Jenkins, only, but this Court presumes it likewise is applicable to any other resident in a similar position. When the Court specifically stated "as applied here" it meant as to Jenkins and other similarly situated residents. Nowhere in the opinion

does it declare the entire statute unconstitutional, but limited the constitutional defect to only the omission. The decision applied only to the facts of the case before the Court. This is indicated by the phraseology so carefully utilized. If this conclusion be correct, the statute can well be found constitutional as applied to other fact situations -- to wit: service upon the guardian or upon the residents spouse or parents.

Covey, supra, adds little to the Court's understanding of the failure of due process as is exemplified in Duffy, supra. Basically, Covey, supra, found that proper service must be prospective and that retroactive service cannot cure the defect. It further held that even though the person involved had not been found legally incompetent, there was ample information available to place authorities on notice that a mere gesture of service was to no avail.

To inform such person of the action being taken it was held:

> "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

The Court will discuss the question of retroactive service later in this Opinion.

We, thus, still have the questions of severance and classification. O'Connell v. Conte, supra, and In Re Hendrickson, 12 Wn. 2d 600, are cases in point. Before discussing the rules and guidelines set forth therein, it should be clear that we are here discussing the omission within a statute which constitutes a constitutional defect as to a certain category of residents as distinguished from the deletion on a part of a statute found to be unconstitutional. In effect we are not severing from the statute itself. To this Court such differential is important. In this case there is no severability or saving

clause which provides that if a part of a statute or chapter is declared unconstitutional, the remaining portion shall not be affected thereby. Under these considerations, it is the duty of the Court to determine whether the omission is fatal to the validity of the entire statute, RCW 72.33.670, or whether in spite of such defect the statute can be found valid as it now exists, and as it pertains to the residents where proper service has or can be made.

The Court is not convinced that severability is an issue in this case. Simply, there is nothing to sever from the statute. Constitutionality must be determined as the statute now stands or not at all. An omission cannot be severed.

Nevertheless, the above conclusion, even if in error, is still severable under the appropriate guidelines.

In Re Hendrickson, supra, which involved the sterilization question, and in discussing severability, provides:

> "A portion of a statute will render the whole of it invalid and the exception will be applied, where the unconstitutional portion is inseparable from the remainder. State v. Bengsch, 170 Mo. 81, 70 S.W. 710; State v. Louisiana Coca-Cola Bottling Co., 169 La. 167, 124 So. 769; Smith v. Thompson, 219 Iowa 888, 258 N.W. 190; McFarland v. Cheyenne, 48 Wyo. 86, 42 P. (2) 413; State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N.W. 835; People ex rel. Barrett v. Union Bank & Trust Co., 362 Ill. 164, 199 N.E. 272, 104 A. L. R. 1090.
>
> The all-important, ultimate test is the intention of the legislature. Would the legislature have passed the act with the objectionable portions eliminated? It should be noted that the statute under consideration contains no saving clause of legislative declaration that, if a part is declared unconstitutional, the remaining portion shall not be affected thereby. We must endeavor to discover the legislative intent without the aid of any such express declaration.
>
> This Court has often stated the rule to be that the entire statute will fall where the constitutional and unconstitutional provisions are so

> connected and interdependent in subject matter, meaning, and purpose that it cannot be believed that the legislature would have passed the one without the other, or where the portion eliminated is so intimately connected with the rest of the statute as to make it useless to accomplish any of the purposes of the legislature. Northern Cedar Co. v. French, 131 Wash. 394, 230 Pac. 837; State v. Nelson, 146 Wash. 17, 261 Pac., 796; Corwin Inv. Co. v. White, 166 Wash. 195, 6 P. (2d) 607; State ex rel. Pischue v. Olson, 173 Wash. 60, 21 P. (2d) 516; State ex rel. King County v. State Tax Commission, 174 Wash. 336, 24 P. (2d) 1094."

And in connection with further guidelines for the Court, O'Connell v. Conte, supra, states:

> "It is the duty of the courts to construe legislation so as to make it purposeful and effective. DeGrief v. Seattle, 50 Wn. 2d 1, 10-11, 297 P. 2d 940 (1956). Moreover, in the very recent case of Boeing Co. v. State, 74 Wn.2d 82, 88, 442 P.2d 970 (1968), this court, sitting en banc, considered the question of severability:
>
> An act should not be declared unconsititutional in its entirety because one or more of its provisions is unconstitutional, unless the invalid provisions are unseverable and it cannot reasonably be

> believed that the legislature would have passed the one without the other, or unless the elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes. Hogue v. Port of Seattle, 54 Wn. 2d 799, 341 P.2d 171 (1959)."

As is above set forth, the ultimate question involves the intention of the legislature in writing the statute. The purpose of RCW 72.33 is to assess a reasonable sum from the estates of the residents for the services provided. Certainly all qualified residents were expected to contribute accordingly. Supreme Court decisions have heretofore already approved the collection of different amounts from different residents depending upon the ability to pay. Certain exemptions are also permissible. The legislature having failed to provide for service upon competent residents does not mean they intended not to collect from those qualified under the statute. The categories are not so

connected when we review the purpose of the legislation to declare the entire statute unconstitutional. One is just not reliant upon the other for the accomplishment of the ultimate purpose. The statute under the above rules is severable.

Being severable, the remaining question is whether such severability violates classification standards. In O'Connell v. Conte, supra, the standard is set forth:

> "It is the established rule of law in this state that an enactment is presumptively valid, and the burden is upon the challenger to prove that the questioned classification does not rest upon a reasonable basis. Boeing Co. v. State, 74 Wn. 2d 82, 86, 442 P. 2d 970 (1968). In 1910, in State v. McFarland, 60 Wash. 98, 102, 110 P. 792, this court set out the following standard to which we still adhere:
>
> > "If any such classification can be sustained, it rests entirely with the discretion of the legislature to determine and establish its basis, and its determination when expressed in statutory enactment cannot be questioned successfully, unless it is so manifestly arbitrary, unreasonable, inequitable, and unjust that it will cause an

> imposition of burdens upon one class to the exclusion of another without reasonable distinction. The legislature, within the limitations of an exercise of a reasonable discretion, is required to base its classification upon some practical consideration suggested by necessity."

To constitutionally uphold the statute here in question, as it now stands, admitting the defect, we must find that such omission does not invalidate the entire collection process. If the classification is faulty, and would create such a burden on its parts, the Court must find the entire statute void ab initio. However, under the circumstances of this case a legislative classification, whether intended or not, will be sustained if there is in fact a reasonable basis for distinction, and under the rules of constitutionality it is the duty of the Court to adopt a construction to sustain if at all possible.

Under the present state of the statute we find all within the class are entitled to the services provided, but those who have not been property served -- those not suffering under legal disability -- will in effect receive service without charge. The other categories, assuming the constitutionality of the statute as it now exists, must pay in accordance with their respective estates.

In discussing a similar problem with classificantion, Griffin v. Social & Health Services, 90 Wn. 2d 616 is enlightening. There it is provided:

> "Legislation involving nonfundamental and nonsuspect classifications must satisfy two requirements under the 'rational relationship' test: (1) it must apply alike to all members within the designated class and (2) reasonable grounds must exist for making a distinction between those falling within the class and those falling outside of it. Belancsik v. Overlake Memorial Hosp., 80 Wn. 2d 111, 115, 492 P. 2d 219 (1971). In one of our more recent discussions on the subject we said:

> It is the well-established rule of law in this state that a statutory classification having some reasonable basis does not offend the equal protection clause or the privileges and immunities clause. In order to successfully attack a particular classification, it must be shown that such classification is manifestly arbitrary, unreasonable, inequitable, and unjust.
>
> Accordingly, the question is not whether the statute is discriminatory in nature, nor is it of paramount concern if the classification results in some inequality. The crucial determination is whether there are reasonable and justifiable grounds giving rise to the classification. Finally, in making this determination, it is recognized that the legislature has a wide range of discretion in defining the classifications and that such enactments are presumptively valid.
>
> (Citations omitted.) Childers v. Childers, 89 Wn. 2d 592, 593, 595 P. 2d 201 (1978), quoting Sparkman & McLean Co. v. Govan Trust, 78 Wn. 2d 584, 588, 478 P. 2d 232 (1970)."

The collection procedures in RCW 72.33 provide for exemptions deductions and payment based upon the extent of the estate of a resident. Payments are thus in varying amounts and those without estates

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are provided the services at no cost. Variations are based upon the individual residents financial status. The procedures hinge upon the constitutional requirement of service to protect property rights and appeal procedures. The contribution from those able partially offset such cost to the State.

Under the "rational relationship" test both requirements are here satisfied. The services apply alike to all residents of the different state schools. A distinction exists between residents in their ability to contribute. The fact that RCW 72.33.670 as it now stands is silent as to those not declared incompetent is no different a variation than the procedure adopted. There is a reasonable ground for distinction, and based upon the legal presumptions involved, this Court cannot find that such classification is arbitrary or unreasonably sufficient to void the entire statute. In

effect there is no change in classification because of the omission for the legislature intended to cover all residents. To the extent applicable, excepting those not suffering under legal disability, this Court finds RCW 72.33.670 constitutional on its face.

The next question is whether the defect within the statute which constitutes a failure of procedural due process negates the right of retaining funds from those not declared legally incompetent. As to that segment of the residents the statute is not applicable. The defendant by adopting the new WAC rule, supra, claims this defect is cured by actual service of notice after the taking of the funds and that such later service is, in effect, retroactive, meaning after-the-fact notice is sufficient to retain the funds acquired without due process notice. The Court disagrees, for the law is clear that a constitutional

violation of due process to these specific residents dates from the time of the statutes enactment and not from the date of the decision in Duffy, supra. It cannot operate for such violation is the same as if never passed, and this is of no force or effect. Subsequent service does not cure the defect sufficient to make such ultimate service retroactive. See Covey, supra.

The collections taken from this particular group must fall, unless the defendants allegations by way of cross claims and/or affirmative defense are sufficient. In this regard defendant alleges res judicata, restitution and implied contract, unjust enrichment, laches, estoppel, and the statute of limitations.

These allegations all are directed to equitable relief to retain the monies received. It is clear under the policy and procedures of the Chapter that there is no

reason why a person with adequate resources should not pay a portion of the costs of the necessaries provided, including care and maintenance. These costs should not be absorbed by the taxpayers of this State. Here we have a situation wherein the residents in question are legally competent. The Court must assume that the services have been accepted to a sufficient degree that they have knowledge of the same, have accepted the benefits, and have not specifically dissented. The existing unconstitutionality, as limited, is to no avail. Such residents are not entitled to the best of both ends of the stick. They cannot have the benefit of receiving the necessities of the program and at the same time dodge the liability.

The Court concludes that whether equity be imposed by way of implied contract or unjust enrichment, in either event, such funds as received by the State

for such service and necessities are not recoverable. It is argued by plaintiffs that if such equitable defenses are to be imposed it should be accomplished by separate legal actions, for this action is procedural and should not include substantive matters. This is over-technical to a fault. Plaintiffs instituted this action alleging failure of procedural due process. They have subjected themselves to the jurisdiction of this Court. Defendants have countered with equitable defenses should constitutional violations be proved to this Court. Plaintiffs have also prayed for the return of all funds appropriated. This is substantive in nature, and thus permits the cross-claims to be invoked. If for no other reason than to reduce multiplicity of suits such division of actions cannot be upheld. It would seem there are ample facts in this record to assure a result favorable to the State, and thus

this Court will recognize such defenses as a bar to reimbursement. However, if there be a dispute of material facts as to amounts due, appraisals, basis for liability, revocation or modification, or the like, there then would be genuine issues. These matters, if any, must be returned to the department for hearing after proper notice to such residents within the category.

The Court has attempted to rule on all major questions proposed. The briefing has been excellent, voluminous and detailed. The Court will sign the appropriate pleadings upon presentation all in accordance with the Court's decision herein.

Dated this 24th day of February, 1981, at Olympia, Washington.

(sgd.) FRANK E. BAKER, Judge

(March 18, 1981)

(Whereupon, there were arguments and colloquy pertaining to the aforementioned matter.)

72.33.670

STATE INSTITUTIONS

72.33.670

Financial responsibility for costs of care, support and treatment of residents--Notice and finding of financial responsibility--Service--Appeal--Hearing

In all cases where a determination is made that the estate of a mentally or physically deficient person who resides at a state residential school is able to pay all or any portion of the monthly charges, a notice and finding of financial responsibility shall be personally served on the guardian of the resident's estate, or if no guardian has been appointed then to his spouse or parents or other person acting in a representative capacity and having property in his possession belonging to a resident of a state residential school and the superintendent of the state residential

school. The notice shall set forth the amount the department has determined that such estate is able to pay per month, not to exceed the monthly charge as fixed in accordance with RCW 72.33.660, and the responsibility for payment to the department of social and health services shall commence thirty days after personal service of such notice and finding of responsibility. An appeal from the determination of responsibility may be made to the secretary by the guardian of the resident's estate, or if no guardian has been appointed then by his spouse, parent or parents or other person acting in a representative capacity and having property in his possession belonging to a resident of a state residential school, within such thirty day period upon written notice of appeal being served upon the secretary by registered or certified mail. If no appeal is taken, the notice and finding of responsibility shall

become final. If an appeal is taken, the execution of notice and finding of responsibility shall be stayed pending the decision of such appeal. Appeals may be heard in any county seat most convenient to the appellant. The hearing of appeals may be presided over by a hearing examiner and the proceedings shall be recorded either manually or by a mechanical device. Any such appeal shall be a "contested case" as defined in RCW 34.04.010, and practice and procedure shall be governed by the provisions of RCW 72.33.650 through 72.33.700, the rules and regulations of the department of social and health services, and the Administrative Procedure Act, chapter 34.04 RCW. [1979 c 141 § 239; 1970 ex. s. c 75 § 1; 1967 c 141 141 § 5.]

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NO. 82-742

In The
SUPREME COURT
Of The UNITED STATES
October Term, 1982

FOUNDATION FOR THE HANDICAPPED, et al.,

Petitioners,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES OF THE STATE OF WASHINGTON,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

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OCTOBER TERM 1982

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DEPARTMENT OF SOCIAL AND HEALTH SERVICES OF THE STATE OF WASHINGTON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

I. STATEMENT OF THE CASE

A. Facts

Petitioners seek review of the Washington State Supreme Court's rejection of their claim for damages suffered as a result of their asserted denial of procedural due process and equal protection rights. Peti-

tioners contend that there was inadequate service of notice for the purposes of determining their financial responsibility for costs of care and treatment.

The petitioners in the present case are the same parties who filed a suit against the State of Washington challenging the same statute (RCW 72.33.670) in 1978. See Duffy v. Department of Social and Health Services, 90 Wn.2d 673, 585 P.2d 470 (1978). The court in Duffy held that RCW 72.33.670 was valid except as applied to the situation where the state served notice upon representatives of a legally competent resident but failed to serve the resident him/herself. In this narrow situation the court held that the resident's due process rights were violated. Thereupon the state established modified procedures by administrative regulation to rectify the situation.

The petitioners did not appeal the Duffy decision to this court to have the

statute in its entirety ruled unconstitutional. Petitioners are, however, relitigating essentially the same factual and legal issues as were involved in the Duffy case.

B. History of the case

A summary of the history of the present case appears in the Washington State Supreme Court's opinion. Foundation for the Handicapped v. Department of Social and Health Services, 97 Wn.2d 691, 648 P.2d 884 (1982); see Petition for Certiorari, Appendix A. The Superior Court for Thurston County ruled in favor of the defendant, and the Washington Supreme Court affirmed the lower court's decision. Specifically, the Washington Supreme Court held that where the state has, since 1976, made personal service of notice upon the mentally or physically handicapped (but legally competent) residents - in addition to serving notice upon person or persons acting in a representative capacity as

set forth in RCW 72.33.670 (1967) - the state has complied with due process requirements.

The court also held that between the years of 1967 to 1976, due process was denied only to those residents who were not legally incompetent and yet whose estates had been charged for their care between those years. During those years the state had served only the other persons acting in a representative capacity and not the individual residents in accordance with the specific requirements of RCW 72.33.670. The Washington Supreme Court nevertheless affirmed the trial court's denial of damages to those residents on equitable grounds of unjust enrichment.

C. Summary of petitioners' arguments

Petitioners now assert four arguments in support of their Petition for Certiorari. First, they argue that the state, by statutory definition, knew that at least some of

the mentally or physically handicapped (but legally competent) residents were incapable of responding to notice in a manner which satisfied procedural due process; secondly, they argue that identically situated residents were classified differently by the subject state statute and, as a result, their equal protection rights were violated; thirdly, they argue that the statute (RCW 72.33.670) is impermissibly vague, allowing impermissible discretion to officials in determining whether or not to collect monies from the residents - along with impermissible discretion as to the manner of service of notice to be made upon the residents; and fourthly, the petitioners argue that if RCW 72.33.670 is invalid on either due process or equal protection grounds, then the notice procedures being followed discriminate on the basis of mental handicap and thus violate the Washington Anti-Discrimination Law, RCW 49.60.030.

II. REASONS WHY THE WRIT SHOULD BE DENIED

A. The procedures upheld by the state court's decision do not violate petitioners' procedural due process rights and are not in conflict with applicable decisions of other courts.

This court in Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306 (1950) stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

(Emphasis added.) Id. at 313.

RCW 72.33.670 was held by the Washington Supreme Court in Duffy to be constitutionally defective with respect to notice that was served upon the representatives of a resident but not upon the resident him/herself where that resident was not established as legally incompetent. Duffy v. Department of Social and Health Services,

supra. In neither Duffy nor in Foundation for the Handicapped, however, did the court find the statute void in its entirety because of this narrow constitutional defect, an approach which is consistent with decisions of this court with respect to statutes having constitutional defects. In re Rahrer, 140 U.S. 545 (1891); Butler v. Goreley, 146 U.S. 303 (1892); Central Pacific Railroad Company v. Nevada, 162 U.S. 512 (1895).

This is also consistent with the legislative intent. On four separate occasions the legislature has amended various sections of the law, Ch. 72.33 RCW, pertaining to state residential schools where severability clauses have been included. Each of these clauses has included the words:

> If any provision of this amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

Washington Laws of 1973, 1st Ex. Sess., ch. 154, § 130; 1974 Ex. Sess., ch. 71, § 13; 1977 Ex. Sess., ch. 80, § 76; 1979 Ex. Sess., ch. 217, § 17.

Sutherland, Statutory Construction, similarly states:

> The courts recognize a duty to sustain an act whenever this may be done by proper construction, and extend the duty to include the obligation to uphold part of an act which is separable from other and repugnant provisions.

Sutherland, Statutory Construction § 44.01, p. 336 (4th ed. 1972).

It is clear that the Washington Supreme Court was acting within the scope of its powers and serving the ends of legislative intent by ruling the defective portion of the statute unconstitutional and leaving the remainder of the statute effective.

Petitioners now assert that by leaving the statute essentially intact, the state court's decision

> allows for the service of a printed form notice to a class of per-

> sons the state knows, by statutory definition, are incapable of understanding such notice.

(Petitioners' brief, p. 14.)

The statute to which petitioners refer in this connection is RCW 72.33.020 which, for the purpose of admission to a state residential school, defines mental and physical handicap as follows:

> As used in this chapter, unless the context requires otherwise:
>
> (1) "Mental handicap" is a state of limited development in consequence of which the individual affected is mentally incapable of assuming those responsibilities expected of the socially adequate person such as self-direction, self-support and social participation.
>
> (2) "Physical handicap" is a state of physical impairment in consequence of which the individual affected is physically incapable of assuming those responsibilities expected of the socially adequate person such as self-direction, self-support and social participation.

The Washington Court rejected petitioners' argument that these definitions

necessarily mean that a handicapped resident is incompetent for purposes of due process, saying:

> The relevant statutes unmistakably provide that residents of the state schools include physically handicapped persons. Mental incompetency is not a requisite to admission.

Foundation for the Handicapped, 648 P.2d at 889.

The Washington Court thus rejected petitioners' argument that Covey v. Town of Somers, 351 U.S. 141 (1956) was relevant because:

> The state is not put on notice that every resident is unable to comprehend a notice pursuant to the applicable definitions and statutes.

(Emphasis added.) Foundation for the Handicapped, at 889.

The petitioners now assert that:

> While the state cannot presume the incompetency of residents, in light of its own statutory definition of the population involved, it certainly cannot presume competency, as the Supreme Court of Washington allows.

(Petitioners' brief, p. 20.)

The petitioners thus argue that due process requires that any and every mentally or physically handicapped person admitted to a residential school must undergo a competency hearing. But, because "Mental incompetency is not a requisite to admission" (Foundation for the Handicapped, at 889), petitioners' asserted position would cause residents who are competent to manage their own affairs to be subject to an unnecessary competency hearing simply because they sought admission to a residential school. This would not only be demeaning to the individuals involved and unnecessarily jeopardize their civil rights, but would in addition cause an unnecessary financial drain on the resources of residents. Petitioners' argument reduces down to a presumption that the individual's civil rights as a person and a citizen are to be questioned from the point in time when they first seek

entrance into the residential school. The state subjects no other class of individuals to a similar presumption. The state has specifically forbidden this presumption by providing in RCW 71.05.450 that:

> No person shall be presumed incompetent or lose any civil rights as a consequence of receiving evaluation or treatment for mental disorder.1/

Those persons who are determined incompetent at the entrance competency hearing would lose certain civil rights as a consequence of seeking evaluation and treatment for their mental or physical handicap. Petitioners' argument would be in direct violation of the above statute designed to restrict the state's ability to interfere with the due process, as well as all other, rights of its citizens.

---

[1]Washington case law also clearly supports this rule. See In re Burnett, 30 Wn.2d 160, 191 P.2d 283 (1948); In re Kenstrip v. Cranor, 39 Wn.2d 403, 235 P.2d 467 (1951); In re Varner v. Cranor, 42 Wn.2d 860, 259 P.2d 416 (1953).

B. Petitioners' equal protection rights have not been violated by this subject state statute.

The Washington Court similarly rejected petitioners' equal protection argument. In so doing, the court articulately set out the problem, saying:

> The "classification" in the present case is between Duffy-type adult residents, who are legally competent, and more severely handicapped or juvenile residents who are subject to legal incompetency. All juveniles are in the latter category. Thus, the distinction is not, as the Foundation contends, between severely handicapped and less severely handicapped persons. Rather, the distinction is between those who have been deemed legally incompetent requiring a guardian to manage their affairs and those who have not. Such a distinction in our view does not amount to a suspect classification. Therefore, the rational basis test is the proper standard of review.

Foundation for the Handicapped, 648 P.2d at 888.

Under the rational relationship test, the court then made the following analysis:

> Since juveniles and more severely handicapped adults are less likely to comprehend the personal notice required to be served upon Duffy-type residents, we find a rational basis for distinguishing between the two groups. The rights of handicapped persons subject to a legal disability are best protected by notice to a guardian or other representative. Less handicapped persons not subject to a legal disability are more apt to understand the notice and should be permitted an opportunity to respond on their own behalf as well as through their representatives. Thus, the distinction is premised on the legal competency of the individual and is rationally related to the purpose of the statute, which is to afford each resident with meaningful notice. Such a distinction does not offend the principles of equal protection.

Id. at 888.

The petitioners now assert that the Washington Court presumed that the legislature intended to classify residents based upon legal competency. The petitioners state:

> This is certainly a commendable goal. Unfortunately for the court, the Washington Legislature

> never stated, implied or intended such a classification.

(Petitioners' brief, p. 26.)

The legislature is presumed to have intended its statutes to be constitutional and "statutes should be construed to sustain their constitutionality when it is possible to do so." Sutherland, Statutory Construction § 44.01, p. 336 (4th ed. 1972), citing El Paso and Northeastern Railroad Company v. Gutierrez, 215 U.S. 87 (1909).

Here the purpose of RCW 72.33.670 was to provide for notice, service of process, hearings and appeals. These are all constitutional procedural due process requirements. The Washington Court correctly presumed that the legislature was attempting to meet due process requirements in this statute. Thus the court interpreted the statute so that these requirements were met. For the court to service the ends of the legislature, it was necessary to recognize that

due process required service of notice to be made directly upon a legally competent resident. For an incompetent resident, service must be upon the guardian or person responsible for the incompetent resident. The Washington Court properly analyzed the statute and properly reached the conclusions necessary to fulfill the statute's constitutional obligations. In doing so, we submit, the court did not step beyond the bounds of proper statutory interpretation.

C. The subject state statute is not impermissibly vague.

Petitioners' assertion that RCW 72.33.670 is impermissibly vague is based on a contention that the statute is silent as to four classes of individuals: (1) residents who have guardians; (2) residents found legally incompetent but without guardians; (3) residents declared partially disabled; and (4) residents not subject to a legal declaration of incompetency.

The petitioners assert that:

> The result is impermissible discretion allowed to state officials in determining whether to collect from and the manner of service upon those residents not mentioned in the statute.

(Petitioners' brief, p. 29.)

This court accepts as binding the statutory construction of the state's highest court, with respect to state statutes, for purposes of issues regarding vagueness. Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 309 U.S. 270 (1940).

The Washington Supreme Court stated:

> Since the legislature granted general collection powers to DSHS, it must have intended that the statute be construed to permit and require personal service on all persons constitutionally entitled thereto because such service is reasonably necessary to achieve the objective of the collection program.

Foundation for the Handicapped, 648 P.2d at 889.

Because the Washington Court construed this to be the purpose of the statute, the

court stated that for procedural due process purposes the only relevant distinction is

> between those who have been deemed legally incompetent requiring a guardian to manage their affairs and those who have not.

Foundation for the Handicapped, at 888.

From the Washington Court's construction of the statute, it is perfectly clear that where the person is competent, then he/she is to be served personally; and where the person is incompetent, then the guardian should be served. Under that construction of the statute, an ordinary person exercising ordinary common sense can sufficiently understand and can comply with the statute, which satisfies the test for vagueness. United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973); Jordan v. DeGeorge, 341 U.S. 223, reh. denied 341 U.S. 956 (1951); Broadrick v. Oklahoma, 413 U.S. 601 (1973).

Petitioners attempt to divert this court away from the central issue of competency in order to make the statute appear vague by making distinctions among individuals not relevant to the purposes of the statute. Any resident "not subject to a legal declaration of incompetency" is competent and therefore must have personal service; the category of residents who are "partially disabled" is so broad and uninformative that it has no relevance to the purposes of the statute; to speak of residents who are legally incompetent but without guardians infers that whatever court determined their legal incompetence also failed to appoint a guardian, a peripheral issue to the purposes of the statute; and residents who have guardians are incompetent and thus the guardian should be served.

Petitioners' assertions thus fail to demonstrate vagueness.

D. The procedures upheld by the state court's decision do not violate Washington's Anti-Discrimination Law.

Petitioners' last argument is that the procedures upheld by the Washington Supreme Court violate Washington's Anti-Discrimination Law, RCW 49.60.030. This argument is facially without merit because the petitioners have failed to demonstrate that their due process or equal protection rights were violated as a result of the state's actions. In response to petitioners' argument, the Washington Supreme Court stated:

> The Foundation contends that basing the type of notice that is required on the extent of the residents' handicaps constitutes illegal discrimination. We do not agree. As noted above, the classification is based upon the presence or absence of a legal incompetency. The incompetency can be based upon age, developmental disability, or severe mental deficiency. RCW 11.88.010(1). There has been no discrimination solely "because of" a mental or physical handicap.

Foundation for the Handicapped, 648 P.2d at 888.

The Washington Court properly concluded that Washington's Anti-Discrimination Law had not been violated.

III. SUMMARY

The Petition for Certiorari should be denied. Petitioners' arguments were addressed directly and in depth by the Washington Supreme Court. The opinion below was accurate and correct as has been shown in this response. The Washington Supreme Court's decision was also fair, and it preserves the presumption that all persons, including the mentally and physically handicapped, are entitled to equal treatment under the law and to the same due process rights that apply to all persons.

DATED this 13th day of December, 1982.

Respectfully submitted,

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